FILE COPY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 305 306

MURIEL DODGE NEEMAN (formerly Muriel Dodge),

*Petitioner,*

—against—

COMMISSIONER OF INTERNAL REVENUE.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LAWRENCE R. CONDON,
*Attorney for Petitioner,*
*Muriel D. Neeman,*
165 Broadway
New York 6, N. Y.

# INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Statutes Involved | 2 |
| Question Presented | 4 |
| Statement | 4 |
| Reasons for Granting the Writ | 8 |
| I—The determination below violates petitioner's rights under the Sixteenth Amendment to the Constitution | 8 |
| A. Section 22(k) is unconstitutional | 8 |
| B. Alimony is not income within the Sixteenth Amendment | 17 |
| II—The determination below violates Sections 22(b)(4), the sovereign immunity of the states and political subdivisions thereof, and the constitutional rule of inter-governmental immunity and the Sixteenth Amendment | 23 |
| III—The determination below violates petitioner's rights under the Fifth Amendment to the Constitution | 28 |
| Conclusion | 31 |
| Appendix: | |
| Opinion | 33 |
| Judgment | 35 |

## Citations


Cases: PAGE

Albert R. Gallatin Welsh Trust, 16 T. C. 1398, aff'd sub nom. Girard Trust Corn Exchange Bank, Tr. v. Commissioner, 194 F. 2d 708, cert. den. 344 U. S. 821 20

Audubon v. Shufeldt, 181 U. S. 575 24

Bowers v. Kerbaugh-Empire Co., 271 U. S. 170 9

Burnet v. Wells, 289 U. S. 670 24

Commissioner v. Clark, 202 F. 2d 94 11

Daisy M. Twinam v. Commissioner, 22 T. C. 83 (acq.) 9, 12, 24, 25, 27

Douglas v. Willcuts, 296 U. S. 1 10, 18, 19, 27

Doyle v. Mitchell Bros. Co., 247 U. S. 179 8

Eisner v. Macomber, 252 U. S. 189 23

Fairbanks v. Commissioner, 191 F. 2d 680, cert. den. 343 U. S. 915 12, 24

Gould v. Gould, 245 U. S. 151 8, 17, 18

Harrold v. Commissioner, 232 F. 2d 527 17

Helvering v. Clifford, 309 U. S. 331 18

Helvering v. Fitch, 309 U. S. 149 19

Kohl v. United States, 226 F. 2d 381 10

Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555 30

Luckenbach v. Pedrick, 214 F. 2d 914 20

Mahana v. United States, 88 F. Supp. 285, cert. den. 339 U. S. 978, reh. den. 340 U. S. 847 12, 14, 15, 16, 17, 26

Nichols v. Coolidge, 274 U. S. 531 30

PAGE

Pearce v. Commissioner, 315 U. S. 543 ..... 24
Poe v. Seaborn, 282 U. S. 101 ..... 24, 25, 27
Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429 ..... 10

CONSTITUTION OF THE UNITED STATES:

Article I, Sec. 2, Clause 3 and Section 9, Clause 4 ..... 3, 10
Fifth Amendment ..... 3, 11, 28, 29
Tenth Amendment ..... 4
Sixteenth Amendment ..... 4, 8, 14, 15, 17, 18, 23, 26

STATUTE AND REGULATIONS:

1939 Internal Revenue Code as Amended:

I. T. 2628, XI-1 CB 34, 22-5493 ..... 18

Regulations 45, Art. 73 (Act of 1918); 62, Art. 73 (1921); 65, Art. 73 (1924); 69, Art. 73 (1926); 74, Art. 83 (1928); 77, Art. 83 (1932); 86, Art. 22(b)(3)-1 (1934); 101, Art. 22(b)(3)-1; 103, §19.22(b)(3)-1 (1939) 18

T. D. 2090, Dec. 4, 1914 (1934 CCH par. 98.02) 18

Sec. 22 ..... 2
Sec. 22(a) ..... 18, 19
Sec. 22(b) ..... 23
Sec. 22(b)(4) ..... 23, 25, 26, 28
Sec. 22(k) ..... 5, 8, 9, 10, 11, 12, 15, 16, 17, 19, 20, 21, 24, 25, 26, 28, 29, 30
Sec. 23 ..... 3
Sec. 23(u) ..... 10, 15, 16, 17, 20, 21, 24, 25, 26, 28, 29

PAGE

Sec. 171(a) ..... 15, 16, 17, 20, 21, 26, 28

Sec. 171(b) ..... 17

MISCELLANEOUS:

87 Cong. Record, p. 7267 ..... 20

88 Cong. Record, p. 6377 ..... 20

House of Representatives Report No. 2333, 77th Cong., 2d Session 1942—2 CB pp. 372, 409, 427, 428 ..... 17

1 Mertens, Law of Federal Income Taxation,
Sec. 5.23 p. 223 ..... 18

Sec. 7.21 ..... 24

2 Rabkin and Johnson Federal Income, Gift and Estate Taxation, Section 37.02 ..... 24

Senate Report No. 673, 77th Cong., 1st Session, p. 34 20

Senate Report No. 1631, 77th Cong., 2d Session 1942—2 CB pp. 504, 568 ..... 15

Statement of Randolph Paul, Treasury Dept., Hearings, Ways and Means Committee, 77th Cong., 2d Session, p. 92 ..... 20

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 315

MURIEL DODGE NEEMAN (formerly Muriel Dodge),

*Petitioner,*

—against—

COMMISSIONER OF INTERNAL REVENUE.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MURIEL DODGE NEEMAN (formerly MURIEL DODGE), the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming a decision of the Tax Court of the United States determining that petitioner was liable for payment of Federal income taxes on sums received from her former husband.

### Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 58-2 USTC 9586 (R. 43a, 44a). The opinion of the Tax Court of the United States is reported at 26 TC 864 (R. 29a-38a).

## Jurisdiction

The judgment of the Court of Appeals for the Second Circuit (R. 45a) was entered on May 27, 1958. The jurisdiction of this Court rests upon Sections 7482 and 7483 of the 1954 Internal Revenue Code.

## Statutes and Constitutional Provisions Involved

***Internal Revenue Code of 1939, as amended.***

"SEC. 22. GROSS INCOME

"(b) Exclusions From Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * * *

"(4) Tax-Free Interest.—Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof; or the District of Columbia; or (B) obligations of a corporation organized under Act of Congress, if such corporation is an instrumentality of the United States; or (C) the obligations of the United States or its possessions.

"(k) Alimony, etc., Income.—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the

gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. * * * "

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.—In computing net income there shall be allowed as deductions:

* * * * * *

"(u) Alimony, etc., Payments.—In the case of a husband described in section 22(k) amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection."

## Constitution of the United States

ARTICLE I, SEC. 2, CLAUSE 3

"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers."

ARTICLE I, SEC. 9, CLAUSE 4

"No capitation, or other direct, Tax shall be laid unless in Proportion to the Census or Enumeration herein before directed to be taken."

FIFTH AMENDMENT

"No person shall * * * be deprived of life, liberty or property without due process of law * * * ."

TENTH AMENDMENT

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

SIXTEENTH AMENDMENT

"The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

## Question Presented

The question presented is whether alimony paid to petitioner by a former husband out of tax-exempt income or capital can constitutionally be taxed.

## Statement

This case involves income taxes for the years ended December 31, 1945, 1946, 1947 and 1948. The Commissioner of Internal Revenue determined deficiencies against petitioner in those years as follows:

| | |
|---|---|
| 1945 | $5,220.70 |
| 1946 | $4,291.25 |
| 1947 | $3,833.61 |
| 1948 | $1,551.43 |

(R. 9a-15a).

Said determinations were made by reason of the fact that the Commissioner included in petitioner's taxable income for each of said years alimony received by petitioner from her former husband on the ground that said sums

represented taxable income to the petitioner under Section 22(k) of the Internal Revenue Code of 1939.

The Tax Court of the United States by decision entered July 26, 1956 (R. 39a) upheld the Commissioner and confirmed the above-mentioned deficiencies.

The United States Court of Appeals for the Second Circuit, by its judgment dated May 27, 1958 (R. 45a) affirmed the decision of the Tax Court.

Petitioner and the Commissioner entered into a stipulation of facts which indicated the following (R. 22a-28a):

1. Petitioner is an individual residing at Los Gatos, California. The returns for the taxable years involved herein were filed with the then collector of internal revenue for the second district of New York (Stip., par. 1).

2. On September 29, 1949, the Tax Court decided in *Muriel Dodge Neeman, supra*, that various sums received by petitioner from Horace E. Dodge (hereinafter sometimes referred to as Dodge) for each of the years 1942 and 1943 in accordance with the provisions contained in agreements of August 4, 1933, and October 23, 1939, and divorce decree of October 26, 1939, constituted income to petitioner pursuant to the provisions of section 22(k) of the Internal Revenue Code of 1939 (Stip., par. 2).

3. The Tax Court in *Muriel Dodge Neeman, supra*, also found certain facts summarized herein from (a) to (d), as follows:

(a) That petitioner and Dodge were married May 17, 1928 (Stip., par. 3).

(b) That petitioner and Dodge entered into an agreement on August 4, 1933, not incident to any divorce, which provided among other things for the settlement

of property rights, for periodic payments by the husband to the wife; that the husband was to pay all United States and state income taxes which petitioner might be required to pay because of such alimony payments; that such provision for payment of taxes by the husband was not binding on respondent and could not prevent him from determining taxes due from petitioner based on such alimony payments (Stip., par. 4).

(c) That petitioner and Dodge entered into another agreement on October 23, 1939, incident to the divorce of October 26, 1939, making certain changes in the original agreement of August 4, 1933, and increasing the payments thereunder and providing for approval of the agreements by the Circuit Court of the County of Wayne in the pending divorce proceeding between the parties (Stip., par. 5).

(d) That the final decree of divorce of petitioner and Dodge, dated October 26, 1939, approved, ratified and confirmed the above-mentioned agreement of August 4, 1933, as amended by the agreement of October 23, 1939 (Stip., par. 6).

4. Petitioner received from Dodge $15,000 for each of the years 1945, 1946 and 1947 and $8,750 in the year 1948 in accordance with the above-mentioned agreements and divorce decree (Stip., par. 7).

5. Respondent in determining the deficiencies herein included in petitioner's income the amounts which petitioner received from Dodge on the ground that such amounts represent alimony taxable to petitioner pursuant to section 22(k) of the Internal Revenue Code of 1939 (Stip., par. 8).

6. Dodge filed United States income tax returns for the years 1945 through 1948. The parts of said returns material to this proceeding are set forth in the stipulation of facts at Item 9 thereof, and are summarized herein from (a) to (d), as follows:

(a) He had gross taxable income as follows:

| | |
|---|---|
| 1945 | $3,953.43 |
| 1946 | 4,772.00 |
| 1947 | 5,094.41 |
| 1948 | 7,556.55 |

(b) He had deductions in each of said years in excess of his entire gross taxable income, excluding any deductions for alimony paid to his first wife or to his second wife, petitioner.

(c) He paid his first wife alimony of $4,999.92 in each of said years.

(d) He paid petitioner (his second wife) alimony of $15,000 in each of the years 1945, 1946 and 1947 and $8,750 in the year 1948.

7. Dodge received distribution from the Anna Dodge Dillman Trust of tax-exempt interest on municipal bonds in the following amounts:

| | |
|---|---|
| 1945 | $146,295.35 |
| 1946 | 145,288.00 |
| 1947 | 145,175.84 |
| 1948 | 145,093.41 |

(Stip., par. 10).

8. The specific source of funds used by Dodge to pay alimony to petitioner is unknown (Stip., par. 11).

## Reasons for Granting the Writ

### I

### The determination below violates petitioner's rights under the Sixteenth Amendment to the Constitution.

**A.** ***Section 22(k) is unconstitutional.***

The Sixteenth Amendment to the Constitution contains broad language and clearly permits taxation of anything which is in fact income. There is therefore no basis for taxing the moneys received by petitioner unless it can be shown that income was in some way produced at the time the moneys were transferred by the husband to the wife. Alimony itself does not constitute earnings, increment to capital, gains or profits, but is merely an obligation arising out of the marital relationship rather than any business transaction. Thus, in *Gould* v. *Gould*, 245 U. S. 151, 153-4, which has never been expressly overruled, the Supreme Court held that alimony was not income, and stated:

> " * * * The use of the word itself in the definition of 'income' causes some obscurity, but we are unable to assert that alimony paid to a divorced wife under a decree of court falls fairly within any of the terms employed.
>
> * * * * * *
>
> "The net income of the divorced husband subject to taxation was not decreased by payment of alimony under the court's order; and, on the other hand, the sum received by the wife on account thereof cannot be regarded as income arising or accruing to her within the enactment."

Income has been defined in *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, at page 185 as follows:

"* * * Whatever difficulty there may be about a precise and scientific definition of 'income' it imports, as used here, something entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax; conveying rather the idea of gain or increase arising from corporate activities. As was said in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415, 58 L. Ed. 285, 292, 34 Sup. Ct. Rep. 136: 'Income may be defined as the gain derived from capital, from labor, or from both combined.'"

In the present case there is no gain or increment and in fact no taxable event which would convert the moneys paid to petitioner into income. The situation is similar to that in *Bowers* v. *Kerbaugh-Empire Co.*, 271 U. S. 170, where the court stated at pages 174-175:

"* * * In determining what constitutes income substance rather than form is to be given controlling weight. * * *

"The transaction here in question did not result in gain from capital and labor, or from either of them, or in profit gained through the sale or conversion of capital."

In line with the foregoing principles Judge Murdock of the Tax Court, in his dissenting opinion in *Daisy M. Twinam*, 22 T.C. 83 (acq.), questioned the constitutionality of Section 22(k), stating as follows:

"Congress, in the sections of the Code applicable hereto, has provided that earnings of the divorced husband, which he must report as a part of his gross income, are income a second time when paid to the divorced wife even though no earning or profit creating transaction or circumstances has intervened to make them income a second time. That does not seem

feasible. Furthermore, the language used would make the payments income to the divorced wife even though the former husband necessarily paid them out of his capital. That is also difficult to understand."

In cases such as *Douglas* v. *Willcuts*, 296 U. S. 1, approval has been given to the doctrine that one receiving a benefit or discharging an obligation may be taxable upon income used for such purpose even though for technical reasons the title to the property producing the income may be in someone other than the taxpayer. However, in all such cases there was in fact income to be taxed to someone, whereas in the present case there is no net income or taxable income to be taxed to anyone. Hence, the income tax imposed upon petitioner under the circumstances herein constitutes a direct tax upon mere ownership of the funds without apportionment and, is, therefore, in violation of Article I, Section 2, Clause 3 and Article I, Section 9, Clause 4 of the Constitution. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 578, 580; *Kohl* v. *United States*, 226 F. 2d 381, 384.

As petitioner's former husband had no net or taxable income (excluding all deductions for alimony paid) for the years involved, he is not a taxpayer who could receive any benefit from the application of Section 23(u) and he had no taxable income which might be shifted over and taxed to petitioner under Section 22(k). If Sections 22(k) and 23(u) are applied to petitioner and to her former husband the result would be an increase in the tax burden rather than a saving in tax or an adjustment between the parties by a shifting of the tax. Instead, the income taxes would be prevented, since the 1953 separation agreement required petitioner's former husband to pay any and all income taxes on the amounts paid to her. If these sections are applied then the former husband will have to pay pe-

tioner the amount of her income taxes on the amount received from him under the agreement, petitioner will thereupon owe additional income taxes on such additional amounts, Dodge will have to pay the additional tax to petitioner, and the final result will be an unreasonable and arbitrary pyramiding of income taxes. Such result was surely not intended by Congress in enacting Section 22(k), nor does the Sixteenth Amendment to the Constitution of the United States provide for or justify such a result. The pyramiding of the income tax on alimony payments consisting of tax-exempt interest or capital does not fall within the Sixteenth Amendment and entails an arbitrary and capricious taking of property without due process of law in violation of the Fifth Amendment.

An analogous situation was considered in *Commissioner v. Clark*, 202 F. 2d 94, where in striking down a portion of the *Clifford* trust regulations the court stated at page 99:

> "* * * Without any alteration in the trust indentures and without any change in the relation of any of the parties thereto, that which was not income of petitioners in 1944 and 1945 became such in 1946. This remarkable transformation results, according to the Commissioner, from the regulation under discussion. It is a result based upon fiction rather than the actualities of the situation. The result is so unreasonable and unfair as to be shocking."

By the same reasoning Section 22(k) as applied to petitioner violates the Constitution.

No appellate court has ever squarely and directly sustained the constitutional validity of Section 22(k) where the alimony payment was made out of tax exempt income or capital. All the court cases passing upon the constitutionality of Section 22(k) involved earnings or other tax-

able income which could be shifted over to the wife. Thus, the Tax Court's statement (R. p. 35a) that the constitutionality of Section 22(k) has already been properly challenged and upheld is too broad since it has never been sustained in a situation like the instant one and the cases which it cited are distinguishable from the instant case for the above reason, namely, the presence of earnings or other taxable income, e.g., *Mahana* v. *United States*, 88 F. Supp. 285, cert. den. 339 U. S. 978, reh. den. 340 U. S. 847; *Fairbanks* v. *Commissioner*, 191 F. 2d 680, cert. den. 343 U. S. 915; and *Daisy M. Twiman*, 22 T.C. 83 (acq.).

In *Daisy M. Twiman* v. *Commissioner*, *supra*, the Tax Court considered the constitutionality of Section 22(k) as applied to a situation where the husband had earnings which exceeded the amount of alimony payments to his wife and stated in the course of its opinion at pages 88-9 of 22 T. C.:

> "The primary purpose of sections 22(k), 23(u), and 171 is clear upon reading either the statute or its legislative history. As stated by the Senate Finance Committee (Report No. 1631, 77 Cong., 2d Sess., p. 83):
>
> > 'These amendments are intended to treat such payments as income to the spouse actually receiving or actually entitled to receive them, and to relieve the other spouse from the tax burden upon whatever part of the amount of such payments is under the present law includible in his gross income. * * *'
>
> Thus, where the alimony payments do not exceed the husband's earnings, Congress, for the purpose of actually levying the tax, intended to treat the husband's earnings to the extent of the payments as the income of the wife and not that of the husband."

This Court further stated:

"The issue presented for decision is whether Congress has the power to tax the wife rather than the husband upon that portion of the husband's earnings which is actually received by the wife * * *.

"The earnings out of which the payments were made in the instant case were undeniably income. Prior to 1942 the tax would have been imposed upon the husband from whose labor or capital the earnings were derived. Under the Revenue Act of 1942 the earnings to the extent of the payments were treated as the income of the wife who actually received them. While theoretically more correct to impose the tax upon the husband, it is equally correct realistically to impose the tax upon the wife. The Sixteenth Amendment allows Congress 'to lay and collect taxes on incomes, from whatever source derived, * * *.' This certainly gives Congress the power to designate by 'statutory formula' whether the husband or the wife shall bear the burden of the taxes on alimony payments where, as indicated in *Audubon* v. *Shaufelt*, *supra*, the earnings may be regarded as a portion of the current income or earnings of the husband. Cf. *Poe* v. *Commissioner*, 315 U. S. 543, 547, wherein the Supreme Court indicated that Congress had ample power to devise a statutory formula for the taxation of alimony payments either to the husband or the wife. By sections 22(k) and 171 of the Internal Revenue Code, Congress exercised that power by taxing the wife in the circumstances prescribed in those sections.

"Not only is it more realistic to impose the tax upon the recipient of the earnings, the wife, but it has been judicially determined under somewhat similar circumstances that the earnings were the income of the wife. In *Poe* v. *Seaborn*, 282 U. S. 101, the Supreme Court held that in the community property state of

> Washington the wife was by operation of the law the owner of one-half the husband's wages and to that extent the wages were taxable as her income although they were retained by her husband, the manager of the community. It is true that in the instant case petitioner did not become the owner of the money until the payments were actually received. But petitioner was entitled to the payments by court decree, and for tax purposes the payments were considered by Congress and were treated by the husband as representing a portion of the husband's earnings."

The Tax Court found that on the facts presented in that case a valid tax on income had been levied within the meaning of the Sixteenth Amendment, but the court specifically stated:

> "We find it unnecessary to decide whether the tax would be valid if the husband had no earnings and the payments were made solely out of capital. Nor do we decide whether the earnings could be taxed in the hands of both the husband and the wife, for Congress has not sought to impose such a tax."

Similarly, in the *Mahana* case, *supra*, it appears that the alimony trusts had taxable income which would have been taxable to the husband but for the provisions of Section 171(a), and that the husband had other taxable income from which the balance of alimony could have been paid. There is language in the *Mahana* case which, because of vagueness, is not helpful in determining whether alimony represents income within the meaning of the Sixteenth Amendment. The Court of Claims there makes the bald statement that merely because "a large sum of money comes into [someone's] hands" it thereby is "income to spend, to live on, to save." It is certainly true that if money comes into

someone's hands, he or she can spend it, live on it, or save it, but that is equally true of capital or tax-exempt income as it is of taxable income. Likewise, money which is given to someone or inherited is money "to spend, to live on, or to save," but it does not thereby become income within the purview of the Sixteenth Amendment. It is indisputable that there are many situations in which a sum of money is received but does not automatically thereby constitute "income" and any statute making all receipts of money income would certainly violate the Sixteenth Amendment as an attempt to create income by congressional mandate.

Furthermore, the Court of Claims itself in the *Mahana* case stated that it would be hard to believe that Congress intended to tax the receipt of alimony by the divorced wife when the law had already taxed the husband upon his receipt of the income from which he paid the alimony. In other words, that Court recognized that the sole purpose of 22(k) and 23(u) and the companion Section 171(a) was to shift the tax burden from the husband to the wife, and not to create an entirely new class of taxable income. If alimony *per se* is taxable income, although never prior to 1942 had it been so considered by the treasury regulations and rulings and judicial authorities interpreting the income tax law (see p. 16, *infra*), then there is no reason why the husband should not pay tax when he earns the money and the wife pay tax on the same money when she receives it as alimony. Yet the Senate and House Reports, *Senate Report No. 1631, Seventy-Seventh Congress, Second Session 1942—2 CB pp. 504, 568; House of Representatives Report No. 2333, Seventy-Seventh Congress, 2nd Sess. 1942—2 CB pp. 372, 409, 427, 428*, on the 1942 amendments both make clear that no new tax is contemplated by these sections, and that the sole and only purpose of the sections is to transfer the tax burden on certain income from one party to another. No shift can be made, of course, or was in-

tended, if there is no tax burden in the first place, which is the situation in the instant case.

The opinion in the *Mahana* case, *supra*, confirms the foregoing interpretation of the objective of Sections 22(k), 23(u) and 171(a), and indicates that the wife is taxable only on that income which would have been taxable to the husband had it not been made taxable to the wife by the aforesaid sections. In the course of its opinion, the Court of Claims in the *Mahana* case, *supra*, quoted the following portion of Section 171(a):

> "'There shall be included in the gross income of a wife who is divorced or legally separated under a decree of divorce or of separate maintenance the amount of the income of any trust which such wife is entitled to receive and *which except for the provisions of this section, would be includible in the gross income of her husband*, and such amount shall not, despite section 166, section 167, or any other provision of this chapter, be includible in the gross income of such husband. * * * *'" (Italics added.)

In interpreting the above-quoted provision, the Court then stated as follows:

> "* * * We come then to the question whether the statutes, properly interpreted, tax the plaintiff's income. The plaintiff concedes that, so far as concerns the money received by her as the yield of the securities placed in trust under the 1923 agreement, Section 171(a) is applicable, if it is constitutional. We have quoted the section, and it requires only that there be a divorce, a trust, and the receipt from the trust of *income which would have been taxable to the husband if it had not been made taxable to the wife by the section*" (88 F. Supp. 288-9). (Italics added.)

It is evident from a careful analysis of Sections 171(a) and (b) and companion Sections 22(k) and 23(u) that the wife is taxable only on income that would otherwise be taxed to the husband, who receives a deduction or an exclusion therefor. Accordingly, under the correct interpretation of the statutory provisions as indicated in the *Mahana* case, *supra*, petitioner herein is not taxable on the monies received from her former husband since he was not taxable thereon and excluded the same from his gross taxable income.

Therefore there was no tax burden upon the husband to be passed over to the wife when she received alimony, and if she is taxed upon the receipt by her of part of the husband's tax-exempt income, then the situation is the same as if the husband had only taxable income, paid the full tax thereon, and then the wife was again taxed on the part thereof that she received as alimony. Thus, in *Harrold* v. *Commissioner*, 232 F. 2d 527, the Court held that a former wife was not liable for income tax on that portion of community income awarded her in divorce proceedings where the income tax had already been paid on the total community income.

**B. *Alimony is not income within the Sixteenth Amendment.***

It is beyond dispute that Congress cannot by legislative fiat make income out of something which, in fact, is not. The Supreme Court has never held that alimony is income, but, in fact, has held that it is not. *Gould* v. *Gould*, 245 U. S. 151. Furthermore, the Supreme Court has never adopted such an extreme definition of income as urged by respondent below, on the basis of certain language in *Mahana* v. *U. S.*, *supra*, which, when taken out of context, indicates in effect that any receipt of money is income. It is obvious that this extreme definition of income, as pointed out above, is meaningless, but it does indicate the extent

to which respondent was driven in order to sustain his view of alimony *per se* as income.

The Tax Court view, in its opinion sustaining respondent and based upon the *Mahana* case, is clearly contrary to the position of the Supreme Court in the *Gould* case, which was approved as recently as 1936 in *Douglas* v. *Willcuts*, 296 U. S. 1. Furthermore, from 1914 to 1942, treasury decisions and regulations under all the Revenue Acts enacted during that entire period have consistently and continuously declared that neither alimony nor an allowance based upon a separation agreement constituted taxable income and was not considered taxable income in common usage and parlance. Moreover, the interpretation of the Supreme Court in the *Gould* case and in the long standing treasury regulations gave full recognition to the fact that Congress had intended to use to its fullest extent the power granted it by the Sixteenth Amendment. Regs. 45, art. 73 (Act of 1918); Regs. 62, art. 73 (1921); Regs. 65, art. 73 (1924); Regs. 69, art. 73 (1926); Regs. 74, art. 83 (1928); Regs. 77, art. 83 (1932); Regs. 86, art. 22(b) (3)-1 (1934); Regs. 101, art. 22(b) (3)-1; Regs. 103, §19.22(b) (3)-1 (1939); 1 Mertens, Law of Federal Income Taxation, Sec. 5.23, p. 223; I. T. 2628, XI-1 CB 34, 22-5493; T. D. 2090, Dec. 4, 1914 (1934 CCH par. 98.02); *Douglas* v. *Willcuts*, *supra*; *Helvering* v. *Clifford*, 309 U. S. 331.

Thus it was well settled for over a quarter of a century that alimony did not fall within the coverage of Section 22(a) of the 1939 Code and its predecessors which were reenacted in substantially the same language over the years and interpreted as aforesaid and were intended to include within their scope everything which represented taxable income. In *Douglas* v. *Willcuts*, *supra*, the Supreme Court considered Section 22(a) and its application to alimony and found that trust moneys diverted by the husband to dis-

charge his obligation to support his former wife were taxable to the husband but not to the wife, although she was the ultimate recipient of the moneys. If alimony is in fact income then the wife as well as the husband would have been taxed upon these trust moneys under Section 22(a) and without any need for the exactment of a section such as 22(k).

Similarly, in *Helvering v. Fitch*, 309 U. S. 149, which followed the rule in *Douglas v. Willcuts, supra*, the Court pointed out that a lump sum allowed to a wife is alimony in the form of "permanent alimony." On that premise permanent alimony should be as taxable to a wife under the income tax law as periodic alimony is taxable to her under Section 22(k). Respondent has never attempted, however, to subject lump sum permanent alimony to income tax, apparently for the reason that lump sum alimony is not regarded as income at all. If alimony as such is subject to income tax then a lump sum payment of permanent alimony should also be subject to income tax.

The import of the 1942 amendments was clearly indicated by Congressman Disney, a member of the House Ways and Means Committee who stated in the course of the discussion of the bill:

> "The present law does not permit the husband any deduction on account of alimony or separate maintenance and does not treat such payments as income to the wife. With the increased rates applicable to individuals, many husbands compelled to make large alimony payments will not have enough income left to pay their income tax.
>
> "The amount of a husband's income which goes to the wife as alimony under a court order is in reality not income to him at all since he has no control over it as the use to which it is to be put. The bill recognizes

this reality by permitting the husband to deduct *so much of his income* as is paid out in alimony and by taxing the alimony payments to the wife" (88 Cong. Rec. p. 6377). (Italics added.)

See statement of the late Senator George, 87 Cong. Rec. page 7267.

The object, in short, was to shift the tax burden along with the moneys shifted. There is no reason or basis, however, for attempting to apply the statute to the instant case, where there is no net taxable income to be shifted over, and the application of the statute would impose a tax where there was none before and would in fact increase the tax burden on petitioner's former husband.

The cases of *Luckenbach v. Pedrick*, 214 F. 2d 914, and *Albert R. Gallatin Welsh Trust*, 16 T. C. 1398, aff'd sub nom. *Girard Trust Corn Exchange Bank, Tr. v. Commissioner*, 194 F. 2d 708, cert. den. 344 U. S. 821, are distinguishable from the instant case. Neither of said cases involved a situation in which no one could have obtained a tax benefit from the payments made to the former wife; in each of said cases the payor had taxable income, and could have taken a deduction for the payments to the former wife regardless whether or not actually taken, with the result that there was a tax burden which under the statute could be shifted over.

Any interpretation of the *Welsh* case as involving a payment out of corpus is clearly contrary to the Congressional intent and the illustrations contained in the Senate Report dealing with the provisions of the 1941 Revenue Act, which were eventually incorporated into Sections 22(k), 23(u) and 171(a) (*Senate Report* No. 673, 77th Congress, 1st Session, p. 34).* This Senate Report No. 673

* See Statement of Randolph Paul, Treasury Dept., Hearings, Ways and Means Committee, 77th Cong. 2d Sess. p. 92.

explains the operation of what later became Section 171(a) and its relation to Sections 22(k) and 23(a) by the following examples:

"(2) Under the same facts as in the previous example the decree of the court provides that in all events Mrs. X shall receive $10,000 a year as alimony. In the first taxable year beginning after December 31, 1942, the net income of the trust is only $8,000. The trustees, therefore, pay an additional $2,000 from the corpus of the trust to Mrs. X. In such a case only $8,000 is includible in the income of Mrs. X under the provisions of section 171. No part of the trust income is includible in the gross income of Mr. X nor is he allowed any deduction for any part of the $10,000 paid to Mrs. X. However, if the additional $2,000 is not payable out of the corpus of the trust but is payable by Mr. X to Mrs. X, then the $2,000 paid by Mr. X to Mrs. X is income to her under section 22(k). Therefore, for 1942 Mrs. X includes $10,000 in her income, Mr. X does not include in his income the $8,000 paid to Mrs. X by the trust but is entitled to deduct the $2,000 paid by him to Mrs. X.

"(3) Mr. Y is the beneficiary of a trust established under the will of his father. Under the terms of the trust, the trustees are to pay to Mr. Y $10,000 a year from the net income of the trust, but if the net income of the trust for any year does not equal $10,000, to pay the net income and so much more from the corpus of the trust as will total $10,000. In 1942 Mrs. Y obtains a divorce from Mr. Y. Under the divorce decree Mr. Y is to pay Mrs. Y $5,000 a year for his life. To meet this obligation under the divorce decree, Mr. Y assigns to Mrs. Y for 5 years one-half of the amount he is otherwise entitled to receive from the trust, promising

to make another such assignment or to provide another method of payment of the $5,000 a year to her at the expiration of that period. In 1942 the net income of the trust is $8,000. Under the terms of the trust instrument and of the assignment by Mr. Y to Mrs. Y the trustees pay $5,000 to Mr. Y and $5,000 to Mrs. Y. Since only eight-tenths of the amount thus distributed represents the net income of the trust, only $4,000 of the amount received by Mrs. Y is income to her. Mr. Y will include in his income only $4,000 and will not include any amount on account of the $5,000 paid to Mrs. Y."

The foregoing examples amply demonstrate that a payment out of capital for the support of a wife would not be taxable to her and does not entail an exclusion by the husband. This is so despite the fact that the payment is "alimony" as far as the wife is concerned. In other words alimony as such is not really taxable as income even under the 1942 statutes. By a parity of reasoning the petitioner here is not taxable upon any payment that would not have been taxable to her former husband, whether a payment out of capital or out of tax-exempt income.

## II

**The determination below violates Sections 22(b)(4), the sovereign immunity of the states and political subdivisions thereof, and the constitutional rule of inter-governmental immunity and the Sixteenth Amendment.**

The summary of the Federal income tax returns of petitioner's former husband, Horace E. Dodge, for the years 1945 to 1948 inclusive is set forth in Item 9 of the stipulation of facts herein (R. pp. 25a, 26a). As appears therefrom said former husband's gross taxable income in each of said years was less than his deductions, excluding any deductions for alimony paid to his first wife and to the petitioner, his second wife. Furthermore, his payments to petitioner in each of said years greatly exceeded his entire gross taxable income. Therefore, the payments made to petitioner by him must have been paid out of other than taxable income. Dodge did have substantial tax-exempt income derived from interest on municipal bonds in each of the years involved (Item 10 of Stipulation; R. p. 27a). The source of the payments made by Dodge to petitioner is unknown (Item 11 of Stipulation; R. p. 27a). However, quite obviously the source of such payments necessarily had to be either the tax-exempt income above mentioned or capital, as Dodge's entire gross taxable income was completely absorbed by deductions other than for alimony payments. The receipt by petitioner of either tax-exempt income or capital does not subject her to income tax liability.

Capital as such is indisputably not subject to income tax under the Sixteenth Amendment. *Eisner* v. *Macomber*, 252 U. S. 189. Municipal bond interest is tax-exempt under the provisions of Section 22(b)(4) 1939 Internal Revenue Code

as amended and also is exempt from income tax under the constitutional rule of inter-governmental immunity and the Tenth Amendment to the Constitution. *1 Mertens, Law of Federal Income Taxation*, Section 7.21; *2 Rabkin and Johnson, Federal Income, Gift and Estate Taxation*, Section 37.02. Accordingly, petitioner's former husband was clearly not liable for income tax on the municipal bond interest or any capital received during the years involved. Since the moneys paid to petitioner were either capital or tax-exempt income, such moneys were not taxable when received by the former husband and equally non-taxable when turned over to petitioner. Certainly, Section 22(k), cannot be sustained if it purports to levy the tax upon moneys which are tax-exempt by law, although, assuming *arguendo*, it may be valid in so far as it taxes to the wife a part of the taxable income of the husband or shifts the tax from one spouse to the other. *Daisy M. Ewing* v. *Commissioner*, 22 T. C. 83 (Acq.); *Audubon* v. *Shufeldt*, 181 U. S. 575; 577-8; *Pearce* v. *Commissioner*, 315 U. S. 543, 547; *Burnet* v. *Wells*, 289 U. S. 670, 677-8; *Poe* v. *Seaborn*, 282 U. S. 101; *Fairbanks* v. *Commissioner*, 191 F. 2d 680, cert. den. 343 U. S. 915; *Senate Report* No. 1631; 77th Congress, 2d Session, p. 83; *H. Report* No. 2333, 77th Congress, 2d Session, pages 71-2.

According to the foregoing authorities, the acknowledged purpose of Sections 22(k) and 23(u) of the 1939 Internal Revenue Code as amended was to relieve husbands of the burden of paying high rates of income tax on moneys which they were legally bound to pay over to a wife or a former wife. The legislative history of these sections appears in the identical reports of the House Committee on Ways and Means and the Senate Finance Committee, where it is pointed out that under the then existing system the husband was taxed in full on his entire net income, notwithstanding the fact that a large part thereof might have necessarily

been paid to his wife as alimony or separate maintenance; that the increased surtaxes intensified the hardship on such husbands and "in many cases the husband would not have sufficient income left after paying alimony to meet his income tax obligations." It was therefore deemed more fair and equitable to have the wife or former wife, who was the actual recipient of a portion of the husband's income, pay the income tax attributable to such portion. Section 22(k) was therefore enacted requiring the wife to include such moneys in her gross income, and correlative Section 23(u), permitting the husband to take the money so paid as a deduction.

In the present case, as has been shown above, the payments to petitioner were made out of either capital or tax-exempt income. This makes the instant case entirely different from the *Twitty* case, *supra*, where the husband had sufficient earnings to pay the alimony and the tax upon the wife was therefore upheld. Under the doctrine of that case and of the cases cited therein, what is done by Section 22(k) is to make part of the taxable income of the husband that of the wife, and then levy an income tax on her as to such taxable income. Since in this case the husband had no taxable income, obviously there can be no shift of taxable income from him to petitioner. Furthermore, if a portion of the husband's tax-exempt income or of his capital is shifted over to the petitioner then no income tax can be levied thereon without violating the provisions of the Sixteenth Amendment to the Constitution or Code Section 22(b)(4) or the Constitutional rule of inter-governmental immunity. On the reasoning of *Poe* v. *Seaborn*, *supra*, the petitioner must be deemed the owner of a portion of the husband's tax-exempt income (or capital) which retains its character as such on payment to her, and which consequently is excluded from taxable income by Section 22(b)(4) and is not taxable under Section 22(k).

The payments herein to petitioner should be equally non-taxable to her, as would be receipts from an alimony trust the corpus of which consisted of tax-exempt securities. For that matter, under the principles of the authorities cited above, petitioner's tax position herein should be the same as if she received income from tax-exempt securities owned by her.

The rationale upon which Section 22(k) was adopted and may be sustained is the fact that taxable income and the tax thereon are shifted from one spouse to the other. In this case Section 22(b)(4), the rule of inter-governmental immunity, and the Sixteenth Amendment preclude the imposition of any tax upon petitioner herein by reason of her receipt of tax-exempt income or capital from her former husband, even assuming *arguendo* that Section 22(k) may validly shift over the tax on taxable income from one spouse to the other.

It is significant that in the instant case there is no intervening act, such as the earning of interest or the earning of income in any other manner. All that has happened is that a portion of the husband's tax-exempt income has been shifted over to the petitioner to take care of his support obligation without intervention of any act that would convert the tax-exempt income in his hands to taxable income in her hands. This analysis is supported by the opinion in the *Mahana* case, *supra*, which, as discussed above, indicates in interpreting Sections 22(k), 23(u) and 171(a) that the wife is taxable only as to "income which would have been taxable to the husband." In accordance with that reasoning, it is clear that if, prior to the statutory amendments of 1942, the husband had created an alimony trust consisting of tax-exempt securities, the income of which would be payable to his former wife, the income of that trust would have been attributed to him under the

principles of *Douglas* v. *Willcuts*, *supra*, but excludable from his gross income because of the tax-exempt nature of that income. Correspondingly, the income of such a trust which, but for the 1942 amendments, would have been attributable to the husband, must now be attributed to the former wife, and is now equally excludable from her gross income because of its tax-exempt nature. The same principles are applicable to the payments made to petitioner by her former husband out of his tax-exempt income so that they are excludable from her gross income just as much as from her former husband's.

In addition, the petitioner in the instant case, it must be conceded, has made no earnings or received no increment or gain, but is only entitled to a portion of her former husband's income paid over to her in accordance with support obligation under the separation agreement and court decree. Thus, under the principles of the *Twinam* case, *supra*, and *Poe* v. *Seaborn*, 282 U. S. 101, the petitioner, like the wife in a community property state, is entitled, by force of law, to a portion of her former husband's tax-exempt income which, in effect, is shifted over to her from him, and is therefore deemed to have received a portion of his tax-exempt income, which retains its original character in her hands, as in his. In short, for tax purposes petitioner is in effect the taxpayer on a portion of her former husband's tax-exempt income in its tax-exempt status. The instant situation is similar to an assignment of a portion of the income of a trust consisting of tax-exempt securities, which would not be taxable to her because of its tax-exempt nature. In the one case she would be entitled to support just as she is in the other. In each case, therefore, the money would have the same status in her hands.

The foregoing treatment of the payments received by petitioner is entirely consistent with the sole objective of

Sections 22(k), 23(u) and 171(a), the requirements of Section 22(b)(4), and the doctrine of intergovernmental immunity.

## III

**The determination below violates petitioner's rights under the Fifth Amendment to the Constitution.**

The original separation agreement entered into between petitioner and Horace E. Dodge on August 4, 1933 contains the following language in Paragraph One (e):

> "(e) the husband shall pay any American Federal or American State income or surtaxes to the extent to which the payments heretofore mentioned may be subject to such tax liability" (See Stipulation of Facts, Par. 4, R. p. 23).

The above mentioned clause was an essential part of the original agreement, was never modified or changed in any way, and said provision was in full force and effect in all of the taxable years involved. Said agreement was made approximately nine years prior to the 1942 amendments to the Internal Revenue Code, which added Sections 22(k) and 23(u). At the time the parties entered into the August 4, 1933 agreement, periodic payments for support as provided for in said agreement were not deductible by the husband for Federal income tax purposes, and were not includible in the wife's gross income. However, the parties by making this agreement intended to fix income tax liability in the husband for the life of the agreement, and intended that the wife should receive the full amount of the payments provided for by the agreement, without any deduction for income taxes. The agreement by the husband to pay such taxes was an element in the consideration

offered by him to induce the wife to accept the terms of the agreement and to enter into it.

When the parties were divorced by decree dated October 26, 1939, the Wayne County, Michigan, Circuit Court ratified, approved and confirmed the agreement of August 4, 1933 as amended (Stip. of Facts, Par. 6, R. p. 24a), and in effect directed the parties to carry out all of the terms thereof including the husband's obligation to pay the income taxes, if any, on the payments to petitioner. Therefore the parties had established or fixed their contractual rights by the agreement of August 4, 1933, and the appropriate court had given its stamp of approval to such fixed contractual rights.

If petitioner is now required to pay the federal income taxes on the amounts received by her under the above-mentioned agreement she will not receive the amount to which she is entitled under the contract and court decree, and conversely, if the husband can deduct the payments from his gross income and does not pay income tax, if any, on said payments, then he will receive something to which he is not entitled under the contract. The rights of the parties were fixed long prior to the adoption of Sections 22(k) and 23(u) of the 1939 Internal Revenue Code as amended.

Under the Fifth Amendment to the Constitution of the United States Congress is without power to impair the obligations of pre-existing contracts or property rights vested under a valid judgment of a state court. Therefore petitioner's property rights under the pre-existing contract and valid state court judgment cannot lawfully be taken away from her by application of said Section 22(k) lest there be an impairment of obligations and property rights forbidden by the Fifth Amendment as a taking of property from petitioner without due process of law.

*Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555; *Nichols* v. *Coolidge*, 274 U. S. 531.

A taxing statute may be unconstitutional under the "due process" clause if it provides for a clear and a gross inequality or injustice, and one of the tests of the validity of such a taxing statute is whether the means adopted is appropriate to the end.

As petitioner has pointed out above it is one thing to shift a tax over from one taxpayer to another on the ground that a part of the first taxpayer's income is being diverted from him and the second taxpayer is receiving a benefit in that amount. It is quite another thing to enact a taxing statute which violates the pre-existing contract rights of the parties as to which one shall bear the burden of a tax and which statute also attempts to create income out of something which never before was treated as income under the tax laws and regulations thereunder. Furthermore, it can hardly be said that the means adopted here, if applied to petitioner, is appropriate to the end. The "end" which Congress had in view in adopting the statute was to relieve husbands obligated to make certain support payments by shifting the tax burden thereon the former wife. If applied here the statute not only does not achieve that end but instead places a new tax burden on moneys which were not taxable before, and then compounds the harm by then making the wife taxable again when the husband, pursuant to his contract, pays her tax, with the final result that the husband pay an initial tax and then tax on tax, even though, in the first instance, in his hands, the same moneys were not taxable at all. It therefore clearly appears that under the circumstances of this case the application of Section 22(k) is so arbitrary, capricious and unreasonable that it amounts to a confiscation and a clear and a gross injustice. Furthermore, Section 22(k) violates the Fifth Amendment

since it provides unequal treatment and discriminates unjustly against a former wife receiving payments under a decree of divorce or separation, as contrasted with the favorable treatment accorded a former wife receiving alimony under a separation agreement alone, or pursuant to a decree of annulment or specific performance, or a wife living with her husband and children receiving support from the father in discharge of his parental obligation.

## CONCLUSION

**For the reasons hereinabove stated, this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.**

Respectfully submitted,

LAWRENCE R. CONDON
*Attorney for Petitioner,*
*Muriel D. Neeman*
165 Broadway
New York 6, N. Y.

# APPENDIX

## Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 315—October Term, 1957.

(Argued May 7, 1958 Decided May 27, 1958.)

Docket No. 24418

MURIEL DODGE NEEMAN (Formerly Muriel Dodge),

*Petitioner-Appellant,*

—v.—

COMMISSIONER OF INTERNAL REVENUE,

*Respondent-Appellee.*

Before:

WATERMAN and MOORE, *Circuit Judges,*
and GALSTON, *District Judge.*

Petition for a review of a decision of the Tax Court of the United States denying petitioner a redetermination of deficiencies found by the Commissioner in petitioner's income taxes for the taxable years 1945-1948, inclusive. Tax Court opinion reported at 26 T. C. 864, Arundell, *J.* Affirmed.

LAWRENCE R. CONDON (Morton C. Fitch, of counsel), New York City, *for Petitioner-Appellant.*

CHARLES K. RICE, Assistant Attorney General; Lee A. Jackson, L. W. Post, Attorneys, Department of Justice, Washington, D. C., *for Respondent-Appellee.*

PER CURIAM:

The Tax Court decision is affirmed on the opinion below, 26 T. C. 864.

## Judgment

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of May one thousand nine hundred and fifty-eight.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
*Circuit Judges.*

HON. CLARENCE G. GALSTON,
*District Judge.*

---

MURIEL DODGE SEEMAN (formerly Muriel Dodge),
*Petitioner.*

—v.—

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

---

Appeal from The Tax Court of the United States.

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. DANIEL FUSARO
*Clerk*